Supreme Court, U. S.
FILED
FEB 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1197

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner

v.

MASSACHUSETTS FINANCIAL SERVICES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Securities Investor Protection Corporation ("SIPC") respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Circuit entered December 1, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 545 F.2d 754 (1st Cir. 1976), and its judgment are respectively printed as Appendix A and B hereto. The opinion of the District Court, reported at 411 F. Supp. 411 (D. Mass. 1976), is printed as Appendix C hereto.

JURISDICTION

By agreement of the parties, no action will be taken pursuant to the mandate of the Court of Appeals until this petition is determined. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Section 3(a)(2) of the Securities Investor Protection Act of 1970 ("SIPA")[1] requires all registered broker-dealers and members of national securities exchanges to be members of SIPC, except those whose "business as a broker or dealer consists exclusively" of one or more specified lines of business. Members must pay assessments on their revenues from the securities business as defined in section 4(i)(1), notwithstanding that the conduct of some of that business does not require registration as a broker-dealer under the Securities Exchange Act of 1934 ("1934 Act").[2]

The question presented is:

> Whether section 3(a)(2) of SIPA exempts a registered broker-dealer from paying assessments on revenues defined as assessable under section 4(i)(1) of SIPA, merely because the segment of its business which requires registration as a broker-dealer would exempt it from SIPC membership under section 3(a)(2) if its business as a broker-dealer consisted exclusively of that segment.

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[1] Pub. L. No. 91-598, § 3(a)(2), 84 Stat. 1637 (1970). Hereinafter all citations to SIPA will be to Statutes at Large.

[2] 15 U.S.C. § 78a *et seq.*

STATUTORY PROVISIONS INVOLVED

Section 3(a)(2) of SIPA provides, in pertinent part:

> (a) Creation.—There is hereby established a body corporate to be known as "Securities Investor Protection Corporation" (hereafter in this chapter referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by act of the Congress. SIPC shall—
>
> . . . .
>
> (2) be a membership corporation the members of which shall be—
>
> (A) all persons registered as brokers or dealers under section 15(b) of the 1934 Act, and
>
> (B) all persons who are members of a national securities exchange,
>
> other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts; . . . .

Also directly involved are sections 4(c)(3)(C) and 4(i)(1), reproduced in Appendix D hereto. Following are descriptions of the material aspects of each.

> *Assessable Non-Broker-Dealer Activities*—Section 4(i)(1) assesses some business not exempt under section 3(a)(2) and which does not require registration as a broker-dealer under the 1934 Act.
>
> *Exclusions From Assessments*—Section 4(c)(3)(C) prohibits assessments on activities which are

exempt under section 3(a)(2), and section 4(i)(1) excludes revenues from such activities from the definition of assessable gross revenues.

STATEMENT OF THE CASE

Nature of Case, Proceedings Below

Respondent Massachusetts Financial Services, Inc. ("MFS") had paid SIPC approximately $5,000 in assessments for 1972 and 1973. In accordance with section 10(a) of SIPA, MFS sued SIPC to recover the assessments and sought judgment declaring that it had not been a member of SIPC. Both MFS and SIPC moved for summary judgment based on stipulated facts. The District Court granted judgment for MFS, and the Court of Appeals affirmed.

The Facts

SIPA became effective on December 30, 1970. At that time MFS was registered as an investment adviser under the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* It did not register as a broker-dealer under the 1934 Act until December 24, 1972.

Since passage of SIPA the securities business of MFS has included investment management services and investment advice to (i) registered open-end investment companies ("Mutual Funds"), as well as (ii) private clients such as employee benefit funds, individuals and institutions.

Prior to its broker-dealer registration MFS arranged for the distribution of Mutual Fund shares through other broker-dealers. MFS registered as a broker-dealer so that it could distribute such shares

itself. MFS' revenues since then may be classified as follows for SIPA assessment purposes:

> *Exempt*—Mutual Fund activities not assessable under sections 4(c)(3)(C) and 4(i)(1).
>
> *Non-Exempt*—Investment advice to clients other than Mutual Funds, defined as assessable under section 4(i)(1) and not exempt under sections 3(a)(2) or 4(c)(3)(C).

MFS reported revenues of $12,850,325 from its 1973 securities business, of which $1,056,048 was assessable. It paid an assessment of $5,280 at the statutory rate of .005 percent. Thus, MFS' contribution to the SIPA program was .0004 percent of its 1973 revenues. It reported assessable revenue for 1972 of only $16,378 on which it paid an $88 assessment. All payments were made under protest.

Opinions Below

The opinion of the Court of Appeals is superficially appealing but lacks meaningful analysis of the relevant provisions of SIPA, including section 3(a)(2), or its legislative history. Many points in SIPC's brief were unanswered save by the cryptic statement that "SIPC has not met its burden . . . of showing why the crucial statutory language ('whose business as a broker or dealer') should not be given its ordinary meaning." (App. 5a n.3). The Court did not explain "ordinary meaning" beyond a reference to 1934 Act definitions of "broker" and "dealer" (App. 5a).

As will be demonstrated, the construction adopted below lacks the preliminary advantage of resting on language which is unambiguous in context. Further,

it (i) produces incongruities in section 3(a)(2) itself, and inconsistencies between it and section 4; and (ii) eviscerates the intent and purpose of Congress to assess all registered broker-dealers and exchange members as a class on their "gross revenues from the securities business", as defined in section 4(i)(1).

The District Court's rationale reflects an additional element. Because SIPA was meant to protect customers whose brokers carry their cash or securities, the District Court held: "It seems logical, therefore, that membership in S.I.P.C. was limited to that phase of the industry where the risk was felt most directly." (App. 17a). As will be demonstrated, membership was not limited to such broker-dealers.

SUMMARY OF SIPA FUNDING SCHEME

This Court is familiar with the history and purposes of SIPA. *SIPC v. Barbour,* 421 U.S. 412 (1975).

SIPC must build its fund to at least $150 million. Sections 4(a)(2) and 4(d)(1)(A)(i). Until it does, all members of SIPC must be assessed not less than ½ of one percent of gross revenues from the securities business, as defined in section 4(i)(1) [hereinafter "Gross Revenues"]. Section 4(d)(1)(A)(i). SIPC may eventually classify members at varied rates of assessment. Section 4(c)(2). It may then take into account such factors as "the nature of their activities . . . and the consequent risks." *Id.* Thus, SIPA looks to the risk to customers solely to determine appropriate assessments, not membership.

Assessable Gross Revenues are defined in section 4(i)(1) to include all securities-related revenues, including those from activities which may be conducted

by persons other than registered broker-dealers. Congress excluded only revenues from (i) the distribution of shares of Mutual Funds and unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance and (iv) investment advice to Mutual Funds and insurance company separate accounts. Sections 3(a)(2), 4(c)(3)(C) and 4(i)(1).

The responsibility for collecting assessments falls primarily on the stock exchanges and the National Association of Securities Dealers, Inc. ("NASD") with whom their member firms (who are SIPC members) must file assessment-related reports and information. Sections 8 and 9(a).

In case of a crisis which SIPC's funds cannot meet, SIPC may borrow up to $1 billion dollars from the United States. Sections 4(g) and (h). SIPA assures repayment by controlling assessments [section 4(d)(1)(A)(ii)], and by authorizing the SEC to impose a transaction fee upon purchasers of equity securities. Section 4(g). Thus, even the investing public may be required to support the SIPA program.

REASONS FOR GRANTING THE WRIT

THE PROPER CONSTRUCTION OF SECTION 3(a)(2) IS IMPORTANT TO THE ADMINISTRATION OF SIPA, AND THE PROTECTION OF THE PUBLIC. THE DECISION BELOW RESULTS IN NON-UNIFORM MEMBERSHIP STANDARDS AND CONFLICTS WITH THE INTENT OF CONGRESS.

A. The Decision of the Court of Appeals Results in Non-Uniform Criteria for SIPC Membership Throughout the Nation, Impedes the Growth of SIPC's Funds and the Scope of SIPA Protection for the Public, and Burdens SIPA's Administration.

In 1975, this Court reversed an erroneous construction of section 7(b) which threatened disruption of SIPA's mechanism for the surveillance and orderly liquidation of SIPC members. Now, an erroneous construction of section 3(a)(2) endangers the funding of the SIPA program and the protection of public investors, and results in uncertainty and conflict in the application of section 3(a)(2).

Conflict—Lack of Uniformity.

With respect, SIPC has declined to follow the decision below in any other Circuit. Thus far, pursuant to section 10(a) SIPC has enforced its view against firms based in New York and Ohio. Litigation has resulted in both cases, each firm relying on the decisions below.[3] It is impossible to project the industry-wide dimension of the problem.

The conflict is exacerbated where firms conduct business in more than one Circuit. Thus, one Philadelphia firm with a Boston branch could possibly benefit from the decision below, whereas another with no First Circuit nexus would be bound by SIPC's view unless rejected by the Third Circuit. There will be conflict, confusion and inequality in the interpretation and application of section 3(a)(2) until this Court resolves the issue.

[3] *SIPC v. Georgeson & Co.*, Civ. No. 76-1061 (D.D.C. 1976); *Westfield Securities Company v. SIPC*, Civ. No. C-2-77-103 (S.D. Ohio 1977).

Administrative Burdens.

The exchanges and the NASD (as well as SIPC) must collect assessments in accordance with SIPA, as construed. In the First Circuit, when firms claim outright exemption it will now be necessary to determine [a] which of their assessable revenues under section 4(i)(1) are derived from business technically associated with the "broker or dealer" function under the 1934 Act, and then [b] whether such activities fall entirely within business specified in section 3(a)(2) of SIPA. In other jurisdictions SIPC's view (until judicially rejected) will limit exemptions to those firms which earn no revenues assessable under section 4(i)(1). There will be administrative difficulties in the First Circuit, compounded by the problem of applying different standards elsewhere.

Effect on SIPC and Treasury Funds.

The effect of the decision below in terms of lost assessments and litigation costs is presently indeterminable. The two litigated cases mentioned above involve more than $100,000 aggregate assessments. Although SIPC's fund is substantial, after six years it still lags behind the statutory minimum target of $150 million. At year-end 1976 the balance was $116.2 million.[4] As

[4] At December 31, 1975 the SIPC Fund totalled $81.7 million. 5 SIPC ANN. REP. 2 (1975). SIPC's annual report for 1976 has not yet been filed with the SEC pursuant to section 7(c)(2) of SIPA.

of December 31, 1976 SIPC had advanced $52.7 million net in the liquidation of 121 SIPC member firms. Congress was greatly concerned that inadequate industry funding of the SIPA program would risk funds of the United States (discussed *infra* at 20 n.30). Clearly, constructions of section 3(a)(2) which undermine the broad industry assessment base contemplated by Congress can only draw federal exposure closer.

Effect on Customer Protection.

The holding that a broker-dealer is not a member of SIPC has implications beyond the financial effect on the firm and SIPC. SIPC's authority to protect customers in SIPA proceedings is limited to customers of SIPC members. Section 5(a)(2). Just how far the rationale of the Court of Appeals will adversely affect the public is an imponderable, but it seems any unwarranted erosion of SIPC's membership conflicts with the public interest and the intent of Congress.

B. The Construction Adopted by The Court Of Appeals Produces Incongruities in Section 3(a)(2), Conflicts With Other Relevant SIPA Provisions, And Fails To Effectuate The Intent of Congress As Revealed By SIPA And Its Legislative History.

SIPC submits that the Court of Appeals reached an erroneous result for two reasons. First, it found the phrase "business as a broker or dealer" plain and unambiguous, ascribing to it its ordinary meaning, without perceiving that such a construction was incompatible with other portions of section 3(a)(2) and the assessment scheme of section 4. If it was not persuaded of SIPC's view based on the relevant statutory provisions, it should have at least determined that an ambiguity existed. Secondly, its appraisal of SIPA's

legislative history as "polyvalent" fails to give due weight to abundant legislative history which unequivocally sustains SIPC's position in this case.

Applicable Principles Of Construction

"[T]here is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" *Harrison v. Northern Trust Co.,* 317 U.S. 476, 479 (1943).[5] "The rule that, where the statute contains no ambiguity, it must be taken literally and given effect according to its language . . ." has utility only where it effectuates the intent of Congress. *Helvering v. New York Trust Co.,* 292 U.S. 455, 464-465 (1934). A literal interpretation of words read in isolation is inappropriate, even where "such an interpretation is possible." *NLRB v. Lion Oil Co.,* 352 U.S. 282, 288 (1957); *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270, 285 (1956).[6] A construction at variance with the statutory purposes "is to be avoided unless the words Congress has chosen clearly compel it." *Lion Oil Co.,* 352 U.S. at 289.

Even a statutory *definition* will not be applied to a provision of the same statute where it would defeat the latter's purpose. *Lawson v. Suwanee Fruit & Steamship Co.,* 336 U.S. 198, 201 (1949); *Farmers Reservoir & Irrigation Co. v. McComb,* 337 U.S. 755, 764 (1949); *see also, United States*

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[5] *See also, United States v. American Trucking Ass'ns,* 310 U.S. 534, 543-544 (1940); *United States v. Dickerson,* 310 U.S. 554, 561-562 (1940); *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48 (1928).

[6] *See also, United States v. American Trucking Ass'ns,* 310 U.S. at 542; *Markham v. Cabell,* 326 U.S. 404, 409 (1945).

v. Public Utilities Commission, 345 U.S. 295, 312 (1953). In the *McComb* case, this Court said: "And we have, therefore, consistently refused to pervert the process of interpretation by mechanically applying definitions in unintended contexts." 337 U.S. at 764. Similarly, identical words (undefined) in different sections of the same statute will be accorded different meanings when necessary to achieve congressional intent. *Atlantic Cleaners & Dyers v. United States,* 286 U.S. 427, 432-433 (1932).

Additional special principles are operative here. First, there is "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967).[7] Second, there is "the elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed. . . ." *Spokane & Inland Empire R. Co. v. United States,* 241 U.S. 344, 350 (1916); *Abbott Laboratories,* 425 U.S. at 12.[8] Exceptions must be limited to the congressional purpose in creating them. *Walling v. Jacksonville Paper Co.,* 317 U.S. 564, 570-571 (1943). The burden rests on the party claiming the exception. *Corning Glass Works v. Brennan,* 417 U.S. 188, 196-197 (1974).[9]

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[7] *See also, Abbott Laboratories v. Portland Retail Druggists Ass'n,* 425 U.S. 1, 12 (1976); *Peyton v. Rowe,* 391 U.S. 54, 65 (1968).

[8] *See also, A. H. Phillips, Inc. v. Walling,* 324 U.S. 490, 493 (1945); *Piedmont & Northern Ry. Co. v. ICC,* 286 U.S. 299, 311-312 (1932).

[9] *United States v. First City National Bank,* 386 U.S. 361, 366 (1967); *SEC v. Ralston Purina Co.,* 346 U.S. 119, 126 (1953).

"A construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain words of the act, and will carry out the intention of Congress." *United States v. Raynor,* 302 U.S. 540, 547 (1938).[10]

Explanation of legislation "by a spokesman for its drafters is significant." *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 203 (1976). To the extent legislative history aids construction, all its varied parts should be consulted. *Wright v. Vinton Branch of Mountain Trust Bank,* 300 U.S. 440, 463 n.8 (1937) [committee reports, explanations of sponsors, the evolution of bill drafts and amendments, and debates expositive of the statutory purpose]. In the final analysis, "a better understanding of the phrase . . . can be obtained from a consideration of the way in which Congress arrived at the statutory language than from trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports." *Corning Glass Works,* 417 U.S. at 198; *see also, United States v. Universal C.I.T. Credit Corp.,* 344 U.S. 218, 222 (1952).

The Statutory Language

SIPA does not define the phrase "business as a broker or dealer" employed in section 3(a)(2). Indeed, the 1934 Act does not do so precisely. Sections 3(a)(4) and (5) of the 1934 Act merely define

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[10] *Boys Markets, Inc. v. Retail Clerk's Union,* 398 U.S. 235, 250 (1970); *Lion Oil Co.,* 352 U.S. at 288; *Mastro Plastics Corp.,* 350 U.S. at 285-286; *United States v. Menasche,* 348 U.S. 528, 538-539 (1955); *Clark v. Uebersee Finanz-Korporation, A.G.,* 332 U.S. 480, 488-489 (1947).

"broker" and "dealer" for purposes of that statute, and as a result refer only to "transactions in securities."[11] They do not purport to describe all types of securities business normally conducted by broker-dealers. Indeed, as far as they go, those definitions are not inflexible even for purposes of the 1934 Act. Thus, the definitions under section 3(a) of the 1934 Act are qualified by the first sentence in that section, namely, "When used in this chapter, *unless the context otherwise requires*—".[12] Notwithstanding the reference to the 1934 Act in section 2 of SIPA[13] on which the Court of Appeals relied, it is clear that section 3(a)(2) of SIPA should be construed as its own context requires.

Even if section 3(a)(2) could properly be considered in isolation, it would show conclusively that "business as a broker or dealer" was not employed in the technical 1934 Act sense. Congress specifically

[11] Sections 3(a)(4) and (5) of the 1934 Act, 15 U.S.C. §§ 78c(a)(4) and (5), provide:

> (4) The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.
>
> (5) The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

[12] 15 U.S.C. § 78c(a). (Emphasis added).

[13] SIPA is not an amendment to the 1934 Act, as is evident from a comparison of section 2 with section 7(d) which explicitly amends the 1934 Act. Also compare earlier bills which would have made SIPA an amendment to the 1934 Act. H.R. 18109, 91st Cong., 2d Sess. §§ 2, 3, 4 (1970); H.R. 18081, 91st Cong., 2d Sess. § 2 (1970); H.R. 18458, 91st Cong., 2nd Sess. § 2 (1970).

employed that phrase in the broadest manner by including in its scope the business of insurance and investment advice. These are not conducted by firms in their narrow capacity as broker-dealers.[14] Either Congress used the critical phrase in a broad sense, as it clearly did, or it misused a technical phrase despite its own definition of "broker" and "dealer" for 1934 Act purposes. Not only does the construction adopted below lead to the latter unlikely conclusion, but also the equally unacceptable view that Congress employed superfluous verbiage. Had it meant to use the critical language technically, it would have sufficed to exclude only lines of business technically conducted as a broker or dealer, *i.e.*, those specified in section 3(a)(2)(i) and (ii). A technical usage would automatically have excluded those in subdivisions (iii) and (iv).

Again confining analysis to section 3(a)(2) in isolation, the critical phrase does not refer to a broker or dealer registered under the 1934 Act. Congress necessarily omitted such a requirement since the phrase was meant also to apply to exchange members who were not registered.[15] Clearly, the language in question was not tied to 1934 Act registration.

The Court of Appeals appears to have considered section 3(a)(2) as a membership provision unrelated

[14] *See, SEC v. Variable Annuity Ins. Co.*, 359 U.S. 65 (1959); *First Atlantic Investment Advisory Corp.*, [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,746 (S.E.C. Div. Mkt. Reg., February 20, 1974).

[15] Section 3(a)(2)(B). When SIPA was enacted, exchange members could, under certain circumstances, do business as a broker or dealer without being registered under the 1934 Act. II L. Loss, SECURITIES REGULATION 1289 (2d ed. 1961).

to its function as part of the funding mechanism of SIPA. A correct and harmonious interpretation of section 3(a)(2) requires that the inquiry begin with section 4(i)(1) which prescribes the assessable revenue base. With the exclusions specified, Congress was laying open to assessment the gamut of securities business commonly conducted by registered broker-dealers and exchange members, irrespective of which technical hat they wear in earning their revenues. Thus, section 4(i)(1) sweeps into the assessment scheme a great variety of revenues, including revenue derived from business not technically classifiable as "business as a broker or dealer"—for example, investment advisory services [subd. (F)], proxy solicitations [subd. (G)] and investment banking [subd. (K)].

The section 3(a)(2) exempting language is but one of three provisions inserted in response to pressures from the insurance and mutual fund industries (discussed *infra* at 20). That the section 3(a)(2) exemption was merely intended to remove certain revenues from assessment, in tandem with sections 4(c)(3)(C) and 4(i)(1), is reasonably clear from SIPA itself, and is crystal clear in the legislative history (discussed *infra,* especially at 22).

Section 4(c)(2) authorizes SIPC to assess all "gross revenues from the securities business", subject to section 4(c)(3) which prohibits [subd. (C)] assessments based on the activities exempted by section 3(a)(2). Section 4(c)(3)(C) is a carbon copy of the description of exempt business in section 3(a)(2). The theme is carried forward by section 4(i)(1) which excludes revenues from exempt activities from the definition of "gross revenues from the securities business". The simultaneous insertion of those three sections for precisely the same reason mandates an attempt to harmonize their terms and legal effect.

Section 3(a)(2) is not the only one in which Congress did not technically employ a particular phrase. Section 4(i)(1) excludes "the business of insurance" from the definition of gross revenues "from the securities business". Given the funding objectives of SIPA, Congress displayed a proper lack of concern with whether assessable revenue was derived from business technically conducted as a broker or dealer.

The only reasonable view of the crucial section 3(a)(2) phrase is that it was meant to refer to the gamut of securities business conducted by the two classes of persons whose SIPC membership was mandated, not as a limitation which would carve out of the assessment scheme revenues specifically assessable under section 4(i)(1). That interpretation would avoid the inconsistency in section 3(a)(2), and the conflict with section 4(i)(1), which the construction adopted below forces on the statute. More important, it would accord with the intent of Congress.

It is noteworthy that the SEC's staff has construed section 3(a)(2) in the manner urged by SIPC.[16]

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[16] *Henry C. Coppelt dba May Pac Management Co.,* [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,814 (S.E.C. Div. Mkt. Reg., May 13, 1974). In that case, the SEC's response to an inquiry included the following statement:

> Similarly, your membership in SIPC is required by the Securities Investor Protection Act of 1970 which provides that SIPC's membership shall consist of all registered brokers and dealers and all members of national securities exchanges *except those who deal exclusively in* mutual funds, variable annuities, the business of insurance or the rendering of investment advice to investment companies or insurance separate accounts. If your activities as a broker are not confined to the exceptions stated, you are required to pay the applicable SIPC assessments.

Id. at 84,201-202 (emphasis added).

Legislative History

SIPA was the product of close cooperation between the SEC, the securities industry's task force and the Department of the Treasury.[17] They sponsored and drafted SIPA; their views are of particular significance. *Ernst & Ernst v. Hochfelder,* 425 U.S. at 204 n.24. Before they agreed on a jointly sponsored bill, the SEC and the industry drafted separate bills.

SEC and Industry Bills

Under the industry's bill[18] all registered broker-dealers would be members of SIPC, unless later exempted by the SEC.[19] The definition of assessable gross revenues included all Mutual Fund activities.[20] The Chairman of the industry task force, currently a director of SIPC, made clear that the cost of the program was "intended to be borne by the securities industry", by *all* registered broker-dealers not exempt by the SEC. *Senate Hearings* at 225, 227; *House Hearings* at 167. The SEC's bill[21] did not employ the membership concept; it simply authorized SIPC to impose assessments on all registered broker-dealers *and* members of national securities exchanges

[17] *Hearings on S. 2348, S. 3988, S. 3989 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency,* 91st Cong., 2d Sess. 11-12, 178, 186, 209-10, 230-31, 234, 241-42, 296 (1970) [hereinafter *Senate Hearings*]; *Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2d Sess. 153, 163-66, 185, 198, 204, 315-16, 352-53 (1970) [hereinafter *House Hearings*].

[18] H.R. 18109, 91st Cong., 2d Sess. (1970) [hereinafter H.R. 18109].

[19] H.R. 18109, § 3, *adding* §§ 35(a)(1) and (7) to the 1934 Act.

[20] H.R. 18109, § 3, *adding* § 35(c)(2) to the 1934 Act.

[21] H.R. 18081, 91st Cong., 2d Sess. (1970) [hereinafter H.R. 18081].

unless exempted by the SEC.[22] Thus the assessable class was broader than under the industry's bill. Under both bills, risk to the public was merely a factor in determining appropriate assessments.[23]

After their initial proposals, the SEC and the industry drafted a joint bill[24] "(Joint Bill") which made SIPC a non-profit membership corporation. Membership was mandated for all registered broker-dealers *and* members of national securities exchanges, unless exempted by the SEC.[25] Assessments could be based on (a) "gross revenues from the securities business", or (b) additional factors including the risk posed to the public by the nature of a firm's business.[26] The definition of "gross revenues from the securities business" conformed almost precisely to the broad definition in the industry's bill.[27]

The focus of the SEC and the industry was on assessing securities business revenues without distinctions based on the technical capacity in which they are earned. In a written memorandum, the SEC stated: "Under paragraph (f)(4) gross revenues are defined as the sum (but without duplication) of eleven specified activities *which are integral parts of the broker-dealer business.*" *Senate Hearings* at 280 (emphasis added). The Joint Bill was intended "to the

[22] H.R. 18081, § 2, *adding* § 35(g) to the 1934 Act.

[23] *Id.;* H.R. 18109, § 3, *adding* § 35(c)(3) to the 1934 Act; *House Hearings* at 203-04.

[24] H.R. 18458, 91st Cong., 2d Sess. (1970) [hereinafter H.R. 18458]; *House Hearings* at 315 *et seq.; Senate Hearings* at 257, 283 *et seq.*

[25] H.R. 18458, § 2, *adding* §§ 35(a) and (h) to the 1934 Act.

[26] H.R. 18458, § 2, *adding* § 35(f)(2) to the 1934 Act.

[27] H.R. 18458, § 2, *adding* § 35(f)(4) to the 1934 Act. *House Hearings* at 385.

maximum extent possible, [to] assess all the securities revenues of a broker-dealer." *Id.* at 281.

The SEC and industry spokesmen were of the view that firms which pose little or no risk to the investing public should be included in the assessment scheme because they would benefit from capital markets invigorated by restored public confidence.[28] The risk-factor was something to be considered only in establishing assessment rates. *House Hearings* at 335, 383-84, 389.

The Genesis of Section 3(a)(2)

The mutual fund segment of the industry urged its exemption from bearing the cost of the program, on the theory that the failure of a mutual fund firm would pose no risk to the public,[29] notwithstanding "that the mutual funds industry . . . has a vital stake in the health and welfare of the stock exchange community." *House Hearings* at 313. The subcommittee chairman expressed deep concern that such exemptions might seriously impair the funding of the SIPA program.[30]

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[28] *Senate Hearings* at 281; *House Hearings* at 335, 383, 387, 390. They specifically alluded to specialists, mutual fund firms, non-carrying broker-dealers, underwriters, and the like.

[29] *House Hearings* at 308 *et seq.*; *Senate Hearings* at 315 *et seq.*

[30] Mr. Moss. One of the great problems that we are going to be confronted with is a level of assessment adequate to create reserves for a sound insurance program and, in the event of demand upon the Treasury, to reimburse the Treasury for whatever is the extent of the draw on the Treasury.

Our problem has been not one of exclusion but one of hopefully finding areas of inclusion in order to raise the revenues to make any such program a totally self-supporting operation.

House Hearings at 312.

The SEC Chairman resisted the proposed exemption for so-called riskless mutual fund dealers.[31] The insurance industry adopted the mutual fund approach. *House Hearings* at 399-400; *Senate Hearings* at 307-08.

As subsequent events show, the mutual fund and insurance industries were accommodated only to the extent of making certain of their revenues non-assessable.

The Intent Of Section 3(a)(2)

The bill reported out by the House Committee conformed substantially to the Joint Bill.[32] With minor differences,[33] it provided precisely what SIPA provides with respect to membership and assessable Gross Revenues. The Committee report pointed out that the program "will be funded by monies raised by and from the industry . . .",[34] and that after SIPC's funds reached $150 million "risk" would be a factor in determining appropriate assessment rates. HOUSE REPORT at 5, 6.

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[31] Mr. Budge. That would be even more true of specialists on the exchange who are included in this bill, and I might comment that this bill provides for a transaction tax if and when borrowings are made from the Treasury; and if the public is going to be asked to foot part of the bill, it would seem to us there should not be any blanket exemption initially at any rate of segments of the securities industry since or because there may be a minimal, or something higher, degree or exposure or risk to the public.

House Hearings at 341-2.

[32] H.R. 19333, 91st Cong., 2d Sess. (1970), *reprinted at* 116 CONG. REC. 39354 *et seq.* (1970).

[33] H.R. 19333, §§ 4(c)(3)(C)(iv), 4(i)(1)(A) and (F).

[34] H.R. REP. No. 91-1613, 91st Cong., 2d Sess. 11 (1970) [hereinafter HOUSE REPORT].

Of paramount significance is that portion of the report which specifically stated the purpose and effect of the exclusion of the lines of business referred to in the membership provision [section 3(a)(2)], the assessment provision [section 4(c)(3)(C)], and the definition of Gross Revenues [section 4(i)(1)]. After stating "[y]our committee determined to remove from the assessment provisions revenues derived from certain sources," the report explained the mechanics:

> *These revenues were removed from the assessment scheme by providing* (1) that persons who would otherwise be members of SIPC but *who engage exclusively* in certain of these four activities would be exempt from membership in SIPC, and that, as to those who engage in these activities but not exclusively, (2) revenues from these activities not be included in gross revenues from the securities business, and (3) SIPC not use the other factors permitted to be considered in setting assessments in such a way as to include any of these activities.

HOUSE REPORT at 7 (emphasis added). It was specificially noted: "[Y]our committee reached those determinations *not because it made a judgment that such activities are or are not properly considered to be broker-dealer activities,* but rather because it seemed appropriate—for other reasons—not to include them in the assessment schedule." *Id.* (emphasis added).

Equally significant is this statement:

> Under the provisions of the bill SIPC will be a membership corporation. Its members will be all persons registered as brokers or dealers pursuant to the Securities Exchange Act of 1934, and all persons who are members of a national securities exchange (that is, an exchange registered under section 6 of the 1934 act), *except that any such persons whose business consists exclusively* of (1) the distribution of mutual fund shares or variable annuities, or (2) the business of insurance, or (3) the business of rendering investment advice to mutual funds or insurance company separate accounts, shall be exempt from membership in SIPC.

Id. at 15 (emphasis added). This statement supplies, in quite appropriate words, the construction of section 3(a)(2) which most accords with section 4(i)(1) and the intent of Congress.

These portions of the House Committee's report were included in its "Section By Section Summary". Yet they were not alluded to by the Court of Appeals which quoted (App. 7a n.5) a segment from the preliminary aspect of the report where the focus was not as sharp. Indeed, that segment failed to mention investment advice and insurance, both of which are referred to in section 3(a)(2).

The House Committee report is unequivocal. Exemption from membership was merely one of the devices for removing certain revenues "from the assessment scheme". Exemption was meant to be a function of non-liability for assessments, not a function of risk or the technical capacity in which a firm does its securities business. Except for one amendment not pertinent here,[35] the bill was passed by the House as reported out by the Committee.

On the Senate side, the bill as reported out by its Committee was different in many respects from the House bill.[36] Section 35(h) would have exempted all

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[35] 116 CONG. REC. 39364 (1970).

[36] S. 2348, 91st Cong., 2d Sess. (1970), *reprinted at* 116 CONG. REC. 40861 (1970).

registered broker-dealers and exchange members who carried little or no cash or securities for customers. This "risk" approach to membership drew sharp dissent from the Secretary of the Treasury,[37] and was quickly superseded by a floor amendment.[38] That amendment followed the House's membership provision and, indeed, was worded precisely the same as section 3(a)(2) of SIPA.

SIPA was enacted in the form reported by the conferees.[39] The Conference Report (at 24) notes that

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[37] In a letter to the Committee Chairman (Senator Sparkman) the Acting Secretary stated, in part:

> If retained, these exemptions would reduce potential revenues by at least 20 percent. Such a reduction would seriously hinder the required accumulation of cash in the balance of the fund within the time anticipated, thus increasing the potential need for the Corporation to borrow from the U. S. Treasury.
>
> Quite apart from the loss of revenues, we continue to feel that all registered brokers or dealers and members of national securities exchanges should be required to be members, with authority in SEC to exempt any such broker/dealers or members of national exchanges as it deems necessary or appropriate in the public interest or for the protection of investors. While certain portions of the Industry do not directly hold customer securities or free credit balances, their operations are so closely related to the overall securities business that they benefit from the preservation of investor confidence in the securities markets and the strengthening of those markets by the general protection of all present and potential customers in such markets.

116 CONG. REC. 40870 (1970).

[38] 116 CONG. REC. 40872 (particularly statement of Sen. McIntyre), 40873 and 40877 (1970).

[39] H.R. REP. No. 91-1788, 91st Cong., 2d Sess. (1970) [hereinafter CONFERENCE REPORT]; 116 CONG. REC. 43075, 43243 (1970).

the bill agreed upon substantially conformed to the bill passed by the House.[40]

Recapitulation

The phrase "business as a broker or dealer" in section 3(a)(2) of SIPA was actually used by Congress to refer to certain securities business which is not technically the business of a "broker" or "dealer." To ascribe a limited or technical 1934 Act meaning conflicts with the actual usage and produces incongruities within section 3(a)(2).

The meaning of the critical section 3(a)(2) phrase becomes apparent upon examination of other relevant provisions of SIPA and its legislative history. Sections 3(a)(2), 4(a)(3)(C) and 4(i)(1) are a cohesive statutory expression of a single congressional decision, *i.e.*, to remove from the assessment scheme revenues from several specified sources. Section 3(a)(2) was not intended as an isolated membership provision with exclusions unrelated to the revenue base of SIPA, as defined in section 4(i)(1).

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[40] In the respects material here, the report (at 25) noted:

> 3. *Gross revenues from the securities business.*—The House bill, in effect, exempted revenues from the sale of mutual funds, variable annuities and investment advice to registered open-end investment companies, as well as revenues from the business insurance . . . .
>
> The conference substitute continues the exemption for commissions on the sale of mutual funds and variable annuities; revenues for the business of insurance; and revenues derived from the rendering of investment advice, but the exemption would include advice to both open-end and closed-end registration investment companies.

The Conference Report did not alter the explanations in the House Report that the exempting provisions of section 3(a)(2) were merely part of the mechanism for excluding specified revenues from assessment.

An harmonious reading of these related sections leads ineluctably to the conclusion that "business as a broker or dealer" refers merely to the securities business of the two membership classes, *viz.*, registered broker-dealers and exchange members. That construction avoids the incongruities within section 3(a)(2) which are forced on the statute by the Court of Appeals. It is entirely consistent with all other relevant parts of SIPA. Most important, it effectuates the intent of Congress without doing violence to the phrase in question. As sponsor and codrafter of SIPA, the SEC viewed all the various section 4(i)(1) securities business as "integral parts of the broker-dealer business." It is not surprising that "broker-dealer" terminology appears in section 3(a)(2) not as a term of art, but as a term of convenient reference to securities business.

The entire purpose of section 3(a)(2) membership is to generate assessments on gross revenues as defined in section 4(i)(1). To read its exempting language in a way that exempts a firm from paying assessments on its specifically assessable section 4(i)(1) revenues is to lose sight of the fundamental role of section 3(a)(2) as a funding device, and to create relief from assessments not intended by Congress.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Court of Appeals Opinion]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1256

MASSACHUSETTS FINANCIAL SERVICES, INC.,
Plaintiff, Appellee,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[411 F.Supp. 411]

[HON. JOSEPH L. TAURO, *U.S. District Judge*]

Before COFFIN, *Chief Judge,*

CLARK,* *Associate Justice, U.S. Supreme Court* (Ret.)
McENTEE, *Circuit Judge.*

Theodore H. Focht, with whom *Wilfred R. Caron* and *William H. Seckinger* were on brief, for appellant.

Daniel B. Bickford, with whom *Gerard A. Corsini* and *Gaston Snow & Ely Bartlett* were on brief, for appellee.

December 1, 1976

McENTEE, *Circuit Judge.* The single discrete question with which this appeal deals is whether appellee, Massachusetts Financial Services, Inc. ("MFS"), is a member of the federally created Securities Investor Protection

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* Sitting by designation.

Corp. ("SIPC").[1] The district court answered this question in the negative and held that MFS was not liable for the $5,368 which it had paid to SIPC as a mandatory assessment for the calendar years 1972 and 1973. 411 F. Supp. 411 (1976). We affirm.

The crucial statute in this case is ¶ 3(a)(2) of the Securities Investor Protection Act of 1970 ("SIPA"), 15 U.S.C. § 78ccc(a)(2), which provides that SIPC shall:

> "be a membership corporation the members of which shall be—
>
> (A) all persons registered as brokers or dealers under section 78*o*(b) of this title [the Securities Exchange Act of 1934], and
>
> (B) all persons who are members of a national securities exchange,
>
> other than persons *whose business as a broker or dealer* consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts. . . ." (Emphasis added.)[2]

[1] The district court carefully recounted the historical background to the establishment of SIPC as an independent corporation by Congress's enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.* It also described the mechanism whereby SIPC accumulates reserve funds (to protect investors should a brokerage firm collapse) by assessing the "member" firms of SIPC. ***Massachusetts Financial Services, Inc. v. Securities Investor Protection Corp.***, 411 F.Supp. 411, 412-14 (D. Mass. 1976). ***See also Securities Investor Protection Corp. v. Barbour***, 421 U.S. 412, 415-16 (1975); 1970 U.S. Code Cong. & Admin. News 5284-85.

[2] Of the four exceptions provided for in the statute, only the first is directly relevant to this case.

MFS contends that § 78ccc(a)(2) specifically exempts it from membership in SIPC because the only business which it conducts *as a broker or dealer* is the marketing (distribution) of the shares of its mutual fund customers. The Sales Division of MFS markets the shares of the firm's mutual fund customers, while other MFS divisions perform other functions. *See* 411 F.Supp. at 414-15 & n.5. Some of these other functions are beyond the pale of the four exceptions specified in § 78ccc(a)(2). It is critical to note, however, that none of the other functions performed by MFS require broker-dealer registration. In essence MFS contends that its only activity *as a broker or dealer* is one which is specifically exempted by § 78ccc(a)(2) and that the other activities conducted by the firm in a non-broker-dealer capacity are irrelevant to the question of its membership *vel non* in SIPC.

SIPC for its part does not deny that the exclusive activity of the Sales Division is the distribution of the shares of the firm's mutual fund customers. It argues, however, that once MFS registered as a broker-dealer (as it was required to do by the 1934 Act so that the Sales Division could conduct its business), it became a member of SIPC by virtue of its other activities which are not included among the specific statutory exceptions and therefore can be assessed, *pro tanto,* for those non-excepted activities. To use the term employed by SIPC in its brief, MFS's registration as a broker-dealer conferred upon it the *status* of "member" in SIPC, *see* § 78ccc(a)(2)(A), and it can divest itself of that status only to the extent that it is involved in one or more of the four exempted activities (which SIPC characterizes as categories of exempt revenue).

For SIPC to prevail, however, it must overcome the significant hurdle that the plain language of the statute specifically exempts "persons whose business as a broker or dealer consists exclusively of . . . the distribution of [mutual

fund] shares." SIPC vigorously argues that the quoted phrase should not be given a technical meaning, but should be understood as exempting only those parties whose securities business (in the broad sense) consists exclusively of one or more of the exempted activities. MFS argues that the expression "as a broker or dealer" means precisely what it says and that since the only activity which it conducts *pursuant to its broker-dealer registration* is unquestionably exempted, it therefore is not a member of SIPC.

A basic principle which must guide our approach to the instant case is that a statute's plain language is the primary indicator of its meaning:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. *Caminetti v. United States,* 242 U.S. 471, 485 (1917).

See also Flora v. United States, 357 U.S. 63, 65 (1968); *United States v. Second National Bank,* 502 F.2d 535, 539-40 (5th Cir. 1974), *cert. denied,* 421 U.S. 912 (1975); *Busse v. Commissioner,* 479 F.2d 1147, 1150-51 (7th Cir. 1973); *United States v. New England Coal & Coke Co.,* 318 F.2d 138, 142-43 (1st Cir. 1963). Of course, deference to the plain meaning rule should not be unthinking or blind. We would go beyond the plain meaning of statutory language when adherence to it would produce an absurd result or "an unreasonable one 'plainly at variance with the policy of the legislation as a whole.' " *United States v. American Trucking Ass'ns, Inc.,* 310 U.S. 534, 543 (1940), quoting *Ozawa v. United States,* 260 U.S. 178, 194 (1922). *See also Commissioner v. Brown,* 380 U.S. 563, 571 (1965); *Organized Migrants in Community Action, Inc. v. Brennan,* 520 F.2d 1161, 1166-67 (D.C. Cir. 1975); *Chappell & Co. v. Frankel,*

367 F.2d 197, 202 (2d Cir. 1966) (en banc). *See generally United States v. Second National Bank, supra* at 540-41; H. Hart & A. Sacks, The Legal Process 1144-1417 (tentative ed. 1958).

In the present case, we believe not only that the language of § 78ccc(a)(2) is clear but also that it produces a result which is neither absurd, unreasonable, nor at variance with the policy of SIPA. While Congress could have chosen to be less generous with its exemptions in establishing SIPC's assessment powers, the statute as enacted does contain the exemptions referred to above. And we cannot say that these exemptions as drafted are absurd or unreasonable on their face or as applied, nor that their presence in the act is necessarily incompatible with the overall scheme of SIPA. Accordingly, we agree with the district court that the words "whose business as a broker or dealer" are to be given their ordinary meaning. *See Banks v. Chicago Grain Trimmers,* 390 U.S. 459, 465 (1968); *United States v. Stewart,* 311 U.S. 60, 63 (1940); *Independent Meat Packers Ass'n v. Butz,* 526 F.2d 228, 237 (8th Cir. 1975), *cert. denied,* 424 U.S. 966 (1976); *Andreozzi v. D'Antuono,* 113 R.I. 155, 158, 319 A.2d 16, 18 (1974).[3] As a result of this reading of the

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[3] SIPC has not met its burden, *Commissioner v. Barclay Jewelry, Inc.,* 367 F.2d 193, 196 (1st Cir. 1966), of showing why the crucial statutory language ("whose business as a broker or dealer") should not be given its ordinary meaning. The words "broker" and "dealer" have highly technical meaning in securities law; if Congress had not intended these words to have their usual technical sense, it could very easily have found appropriate language to so indicate. *Local 1424, Int'l Ass'n of Machinists v. NLRB,* 362 U.S. 411, 417 n.7 (1960).

We note in this regard that SIPA makes explicit reference to the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*:

> "Except as otherwise provided in this chapter, the provisions of the Securities Exchange Act of 1934 . . . apply as if this chapter constituted an amendment to, and was included as a section of, such Act." 15 U.S.C. § 78bbb.

This fact reinforces our belief that when Congress used the word "broker" and "dealer" in SIPA, it used them in the tech-

statute, it is clear that MFS is exempted from membership in SIPC since it is conceded that all of MFS's activity as a broker-dealer is statutorily exempted.

SIPC vigorously urges us to interpret § 78ccc(a)(2) in the light of the legislative history of SIPA, which history SIPC views as supportive of its thesis that the "business as a broker or dealer" language in the statute does not have its ordinary meaning but rather means "securities business" in a general sense. Such use of the legislative history would, however, be contrary to the well-established rule that a court "will resort to the legislative history and other aids of statutory construction only when the literal words of the statute creat ambiguity or lead to an unreasonable interpretation." *Araya v. McLelland,* 525 F.2d 1194, 1195-96 (5th Cir. 1976). *See also United States v. Oregon,* 366 U.S. 643, 648 (1961); *I.T.T. v. G.T.E.,* 518 F.2d 913, 917-21 (9th Cir 1975); *Portland Cement Ass'n v. Ruckelshaus,* 486 F.2d 375, 379-80 & n.13 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974). Since we are satisfied that § 78ccc(a)(2), whether read in isolation or in context, is neither ambiguous nor productive of an unreasonable result, we do not feel required to look to the legislative history for illumination.

We have, nevertheless, read through the legislative history of SIPA with care,[4] and we concede that some portions of the history are at least arguably favorable to SIPC's argument that Congress did not wish to grant broad exemptions because it wanted SIPC to be able to raise a great deal of revenue early in its existence. We stress, however, that the legislative history is by no means unequivocal in

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nical sense in which they are used in the 1934 Act and in securities law generally. *See United States v. Cuomo,* 525 F.2d 1285, 1291 & n.17 (5th Cir. 1976); *United Shoe Workers v. Bedell,* 506 F.2d 174, 183 (D.C. Cir. 1974).

[4] *See Patagonia Corp. v. Board of Governors of the Federal Reserve System,* 517 F.2d 803, 810 n.10 (9th Cir. 1975).

this sense,[5] but rather is polyvalent and reflective of a multitude of views.[6] When we compare this less than clear legislative history[7] with the straight-forward language of the statute, we are confirmed in our conviction that we should adhere to the latter and interpret it in its usual sense. *See Greenwood v. United States,* 350 U.S. 366, 374 (1956); *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945).

It is not our province to decide whether Congress would have been wiser to draft the SIPC legislation so as to in-

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[5] *See, e.g.,* the following language from the House Report which, in describing the criteria for membership in SIPC, uses the same critical language ("whose business as a broker or dealer") as does § 78ccc(a)(2):

> "Membership in the corporation [SIPC] would consist of all brokers and dealers registered under section 15(b) of the Securities Exchange Act of 1934 and all persons who are members of a national securities exchange, except that persons whose business as a broker or dealer consists exclusively of the distribution of shares of mutual funds or variable annuities, would not be included in membership." H.R.Rep. No. 91-1613, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Admin. News 5254, 5258.

[6] It does not strike us as at all surprising that the legislative history is not of one piece. It is quite natural that various and competing interests would seek to have an influence on the shaping of legislation like that which established SIPC. We recall also Justice Jackson's remark that "[i]t is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage." Problems of Statutory Interpretation, 8 R.F.D. 121, 125 (1949). *See also United States v. Public Utilities Commission,* 345 U.S. 295, 319-21 (1953) (opinions of Jackson and Frankfurter, JJ.).

[7] "[L]egislative history should be used to resolve ambiguities, and not to create them." *National Ass'n of Regulatory Utility Commissioners v. United States,* 397 F.Supp. 591, 595 (D.D.C. 1975), *aff'd,* 423 U.S. 1041 (1976). *See also Railroad Commission v. Chicago, Burlington & Quincy R.R.,* 257 U.S. 563, 589 (1922); *Pennsylvania R.R. v. International Coal Mining Co.,* 230 U.S. 184, 189 (1913).

clude firms like MFS as members, *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 195-96 (1936), and it is no part of our function to extend a statute's reach beyond its clearly indicated scope. *Guiseppi v. Walling*, 144 F.2d 608, 614-15 (2d Cir. 1944) (Frank, J.) *aff'd sub nom. Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945). Rather, "[i]t is our judicial function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northern Ry.*, 343 U.S. 562, 575 (1952). Congress remains free to amend SIPA should it so choose, but as it now stands that act clearly exempts MFS.

Affirmed.

APPENDIX B

[Court of Appeals Judgment]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1256.

MASSACHUSETTS FINANCIAL SERVICES, INC.,
Plaintiff, Appellee,

v.

SECURITIES INVESTOR PROTECTION CORPORATION,
Defendant, Appellant.

Judgment

Entered December 1, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Focht and Bickford.]

APPENDIX C

[District Court Opinion]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CA 74-2008-T

MASSACHUSETTS FINANCIAL SERVICES, INC., *Plaintiff*

v.

SECURITIES INVESTOR PROTECTION CORPORATION, *Defendant*

Opinion

March 26, 1976

TAURO, D.J.

This is an action in which Massachusetts Financial Services, Inc. (M.F.S.) is seeking a declaratory judgment on the question of whether it is a member of the federally-established Securities Investor Protection Corporation (S.I.P.C.). It also seeks to recover $5,368 paid to S.I.P.C. in response to S.I.P.C.'s mandatory assessment of M.F.S. for calendar years 1972 and 1973.[1]

Subject matter jurisdiction over both the declaratory and damage claims is based on section 27 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa, as incorporated into the 1970 Investor Protection Act, 15 U.S.C. § 78bbb. Venue is based on those same provisions. Alternatively, subject matter jurisdiction over the plaintiff's monetary claim is based on § 10 of the 1970 Act, 15 U.S.C. § 78jjj(a). Following the filing of cross-motions for summary judg-

[1] There is no dispute on the amount of M.F.S.'s assessment should it be found to be a member of S.I.P.C.

ment, the parties stipulated to all material facts, allowing this court to consider the case on the merits.

I.

S.I.P.C. is an independent corporation established by Congress in 1970 to protect investors from the effects of chronic instability in the securities industry.[2] In late 1969 and early 1970, the price of publicly-traded securities rapidly declined from the heights reached during the halcyon days only a few years before. During the decline, large numbers of institutional and individual investors left the markets, dramatically reducing daily trading volume and thereby drying up the commissions received by brokers and dealers on individual transactions. Persistent financial problems soon beset the securities industry, leading to voluntary liquidations, mergers, receivorships and bankruptcies of a significant number of brokerage houses. Such failures seriously endangered customers' funds which, in turn, led to further, albeit temporary, erosion of confidence and weakening of the industry.

Particularly vulnerable during this period, were the so-called "free credit balances" left in brokerage accounts by customers. This money, which can be withdrawn by the customer at any time, usually represents the proceeds of the sale of a customer's securities or customer's dividends paid directly to his brokerage. Customers with particularly active accounts leave these funds on deposit with the firm largely as a convenience so that they are readily available

[2] *See Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975), *Securities and Exchange Commission v. Baroff Co., Inc.*, 497 F.2d 280 (2d Cir. 1974); *Securities and Exchange Commission v. Aberdeen Securities Co.*, 480 F.2d 1121 (3rd Cir.), *cert. denied*, 414 U.S. 1111 (1973); *Securities & Exchange Commission v. Alan F. Hughes, Inc.*, 461 F.2d 974 (2d Cir. 1972); *Securities and Exchange Commission v. Salmon & Co.*, 375 F. Supp. 867 (S.D. N.Y. 1974); *Securities Investor Protection Corp. v. Charisma Securities Corp.*, 352 F. Supp. 302 (S.D. N.Y. 1972).

for the customer's next transaction. In the interim, however, the funds are available to the broker to maintain positions in securities, to finance margin purchases of other customers and for general operating expenses. Rarely, if ever, is interest paid on these funds.

Broker-dealers also hold substantial amounts of customer securities in safekeeping. Although customers have a right to receive these fully paid securities on demand, there is a risk that they may be improperly transferred or reached by creditors if the technical requirements of "segregation" are not complied with. Moreover, securities purchased by customers on margin are held by the broker and may be pledged as collateral on bank loans.

Prior to 1970, a variety of federal, state and industry regulations had been introduced to safeguard customer assets held by broker-dealers. Firms were required to register with the Securities and Exchange Commission, to maintain certain minimum capital requirements and to limit their aggregate indebtedness in relation to their net capital. Member firms of registered exchanges were required to furnish the customer credit balance statements, disclosing the amount owed the customer, and the fact that his funds are not segregated and may be used by the firm in its own business. Certain exchanges and the National Association of Securities Dealers required segregation and identification of customer securities. After 1964, the New York Stock Exchange and other exchanges established limited trust funds to protect the free credit balances held by member firms.

In 1970, however, as the market declined and brokerage liquidations and bankruptcies became more than isolated occurrences, it became apparent that existing legislation and industry self-regulation provided insufficient protection to customers. Between August and December, 1970, for example, three former members of the New York Stock Exchange were forced to close. But that Exchange refused to

provide protection to customers of those firms, giving as its reason the exhaustion of available funds. The industry then turned to the federal government for assistance.[3]

Congress responded by enacting the Securities Investor Protection Act of 1970. This legislation established S.I.P.C. as a non-profit, independent corporation whose prime responsibility was to establish immediately a substantial reserve fund which would provide protection to investors in the event a brokerage firm collapsed, thereby reinstilling some confidence in the securities markets. The fund would be created and maintained through assessments from the members of S.I.P.C. Membership in the corporation, however, was made mandatory for brokers and dealers registered under § 15 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78a as well as certain categories of other members of national securities exchanges. Membership, therefore, is merely a device for determining who should contribute to the fund.[4]

The issue in this case is whether the plaintiff "qualified" for "membership" in the corporation and is thereby required to contribute to the S.I.P.C. reserve fund.

II.

M.F.S. is a Massachusetts corporation organized in 1969. During its initial years, it performed no broker activities

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[3] This discussion of the events giving rise to the enactment of the 1970 Act is based on the detailed analysis appearing in the Act's legislative history. *See* 1970 U.S. Code Cong. & Admin. News 5254-85.

[4] The establishment of the S.I.P.C. fund is only one aspect of the corporation's responsibilities. In keeping with its responsibilities for the protection of customers, S.I.P.C. is required to maintain "an early warning system" to detect broker instability and, if necessary, to oversee a brokerage's liquidation, all in the context of SEC supervision. *See generally Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975).

requiring registration as a broker or dealer with the Securities and Exchange Commission. It has been registered as an Investment Advisor, pursuant to the Investors Advisors Act of 1940, 15 U.S.C. § 80b-3 since its incorporation.

Until 1973, M.F.S. was organized into two divisions: an Investment Counsel Division and a Mutual Fund Division. The Investment Counsel Division has traditionally provided investment management and advice to clients whose funds and securities are held and transferred by third persons such as bank trustees or custodians. The Mutual Fund Division provides investment management services directly to six registered open-ended mutual funds. The shares of these funds were marketed by brokers and dealers having no affiliation with the plaintiff. Neither one of these functions are broker-dealer activities requiring registration. *See* CCH 1973-74 Fed. Sec. L. Rep. ¶ 79, 746 (February 20, 1974).

In November 1972 M.F.S. decided to expand its operations. It registered as a broker-dealer in December of that year and in early 1973 established a Sales Division for the purpose of marketing the shares of its mutual fund customers itself. No other Division of M.F.S. distributes securities and the sole business of the Sales Division is the distribution of the shares of these six mutual funds.

III.

The prerequisites for S.I.P.C. membership are defined in ¶ 3(a)(2) of the Securities Investor Protection Act of 1970, 15 U.S.C. § 78ccc (a)(2). It provides for membership for:

> (A) all persons registered as brokers or dealers under section 780(b) of this title [the registration provisions of the 1934 Act], and
>
> (B) all persons who are members of a national securities exchange,

> other than persons whose business as a broker or dealer consists exclusively of (i) *the distribution of shares of registered open end investment companies or unit investment trusts,* (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering advisory services to one or more registered investment companies or insurance company separate accounts; . . . . (emphasis added).

The plaintiff claims that its only business *as a broker-dealer* is the activity of its Sales Division. Since that business clearly falls within the exception of subparagraph (i), M.F.S. contends it cannot be considered a member of S.I.P.C. The defendant argues, however, that the words "as a broker or dealer" in the quoted language should be equated with the phrase "in the securities business." Under that view of the statute, the court should evaluate all aspects of M.F.S.'s business. Because some of its activities "in the securities business" go beyond the exceptions specified in the exceptions to S.I.P.C. membership, particularly the work of its Investment Division, M.F.S. should be considered a member of S.I.P.C.[5]

The question appears to be one of first impression. A careful reading of the statute, however, as well as an evalu-

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[5] The nature of the Mutual Fund Division's activities is not clear. Specifically, in their stipulation, the parties have not indicated whether the investment management activities for M.F.S.'s mutual fund clients , the responsibilities plaintiff claims are those of the Mutual Fund Division, include the *providing* of investment *advice. See* Stipulation §4. Even if the Mutual Fund Division does give investment advice to M.F.S.'s mutual fund clients, however, thereby making M.F.S. eligible for the exception listed in subparagraph (iv) as well as the exception listed in sub-paragraph (i), the result in this case would be the same. S.I.P.C. permits a firm to avoid membership by claiming multiple exceptions so long as its "activities as a broker or dealer" do not fall outside the exemptions specified in subparagraphs (i) through (iv). See Stipulation Exhibit 3, page 1.

ation of its legislative history, support the plaintiff's position.

The terms "broker" and "dealer" are words of art, with a specific meaning both in the industry and to those members of Congress intimately involved in the drafting of securities legislation. Section 3(a)(4) of the 1934 Act, 15 U.S.C. § 78c (a)(4) defines a broker as

> any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

Section 3(a)(5) of the 1934 Act, 15 U.S.C. § 78c (a)(5) defines a dealer as

> any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account either individually or in some fiduciary capacity, but not as a part of a regular business.

Both definitions connote a certain regularity of participation in securities transactions at key points in the chain of distribution. Yet, neither definition is all-encompassing. Each excludes, either explicitly or by implication, a variety of functions—commodities trading, various banking transactions—which under the defendant's view might be considered part of the "securities business" in a general sense. *See Henry C. Coppel & Co. d/b/a May-Pak Management Company,* CCH 1974 Sec. L. Rep. ¶ 79, 814 (May 13, 1974).

By incorporating these unambiguous and familiar terms into the 1970 Act, it seems manifest that Congress intended to place some limitations on membership in S.I.P.C. The members of the House Interstate and Foreign Commerce Committee and the Senate Banking and Currency Committee, were certainly familiar with earlier securities legislation eminating from those Committees as well as with the general structure of the industry. If that committee, and eventually the entire Congress, had intended to broaden the membership of S.I.P.C. as the defendant claims, they could have done so without torturing terms which traditionally have had settled meanings in earlier legislation and the industry itself; and which have been incorporated by reference into the 1970 Act. 15 U.S.C. § 78bbb.

The statute's legislative history buttresses this interpretation. As both the House and Conference Reports indicate, the S.I.P.C. fund was established to deal with the specific problem: the risk to members of the investing public who found it necessary to leave assets on account with their brokers. The problem was one which did not involve the entire securities industry, but only brokerage houses which actually marketed securities for the investing public. And the matter came to Congressional attention only when serious declines in commission income raised the spectre of substantial numbers of brokerage failures. It seems logical, therefore, that membership in S.I.P.C. was limited to that phase of the industry where the risk was felt most directly. As noted in the House report accompanying the 1970 Act, the primary aim of the legislation was to "establish immediately a substantial reserve fund which will provide protection to customers of broker-dealers similar to that formerly provided by the exchange trust funds." 1970 U.S. Code Cong. & Admin. News 5257.

S.I.P.C.'s own dealings with the M.F.S. further support this interpretation. It did not demand assessments until M.F.S. had established dealer activities in late 1972. Yet, prior to that time, M.F.S.'s Investment Division had engaged "in the securities business" without any claim for dues on the part of S.I.P.C. and without falling within the exceptions listed in sub-paragraphs (i) through (iv). Surely if mere participation "in the securities business" in a manner not specified in sub-paragraphs (i) through

(iv) was sufficient to trigger S.I.P.C. membership, it would seem logical that S.I.P.C. would have required M.F.S. to participate in the fund prior to its registration as a broker-dealer.[6]

The defendant argues, in response, that the primary objective of the Congress was to create a fund substantial enough to provide meaningful protection to investors' funds. The defendant has not shown, however, that a fund whose contributors are limited to those clearly specified in the legislation would not provide adequate insurance to customers in the event of actual brokerage failure or provide a sufficient psychological boost to industry confidence. Indeed, if the fund should become insufficient for the purposes of the Act, the S.E.C. may, under certain conditions, issue notes to the Secretary of the Treasury in an amount to one billion dollars, the proceeds of which then may be lent to S.I.P.C. 15 U.S.C. § 78ddd(g). *See Securities and Exchange Commission v. Guaranty Bond & Securities Corp.*, 496 F.2d 145, 147 n. 3 (6th Cir. 1974), *rev'd on other grounds sub. nom. Securities and Exchange Commission v. Barbour*, 421 U.S. 412 (1975). Certainly, protection of this scope seems more than adequate for the forseeable future.

Accordingly, this court holds that M.F.S. is not a member of S.I.P.C. and that it is therefore not liable for assessments covering calendar years 1972 and 1973.

/s/ Jos. L. Tauro
United States District Judge

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[6] Of course, once a broker-dealer becomes a member of S.I.P.C., the amount of its assessment may be based on factors other than the amount of business it does as a broker-dealer. *See* 15 U.S.C. § 78ddd. This point seems to have been the source of some confusion during Senate Hearings on the proposals which evolved into the 1970 Act. *See* Defendant's Memorandum at 14-18, *cf. SEC v. Aberdeen Securities Co., Inc.*, 480 F.2d 1121, 1123 (3rd Cir.), *cert. denied*, 414 U.S. 1111 (1973).

APPENDIX D

[Relevant Sections of the Securities Investor Protection Act of 1970]

Sec. 4. SIPC Fund

....

(c) Assessments.—

....

(3) LIMITATIONS.—Not withstanding any other provision of this Act (other than section 3(f))—

....

(C) no assessment shall include any charge based upon the member's activities (i) in the distribution of shares of registered open end investment companies or unit investment trusts, (ii) in the sale of variable annuities, (iii) in the business of insurance, or (iv) in the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts.

....

(i) "Gross Revenues" Defined.—

(1) In general.—For purposes of this Act, the term "gross revenues from the securities business" means the sum of (but without duplication):

(A) commissions earned in connection with transactions in securities effected for customers as agent (net of commissions paid to other brokers and dealers in connection with such transactions) and markups in respect of purchases or sales of securities as principal,

(B) charges for executing or clearing transactions in securities for other brokers and dealers,

(C) the net realized gain, if any, from principal transactions in securities in trading accounts,

(D) the net profit, if any, from the management of or participation in the underwriting or distribution of securities,

(E) interest earned on customers' securities accounts,

(F) fees for investment advisory services (except when rendered to one or more registered investment companies or insurance company separate accounts) or account supervision in respect of securities,

(G) fees for the solicitation of proxies with respect to, or tenders or exchanges of, securities,

(H) income from service charges or other surcharges in respect of securities,

(I) except as otherwise provided by rule or regulation of the Commission, dividends and interest received on securities in investment accounts of the broker or dealer,

(J) fees in connection with put, call, and other option transactions in securities, and

(K) fees and other income for all other investment banking services.

Such term does not include revenues received by a broker or dealer in connection with the distribution of shares of a registered open end investment company or unit investment trust or revenues derived by a broker or dealer from the sale of variable annuities or from the conduct of the business of insurance.

Supreme Court, U. S.
FILED
APR 8 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 1197.

SECURITIES INVESTOR
PROTECTION CORPORATION,
PETITIONER,
v.
MASSACHUSETTS FINANCIAL SERVICES, INC.,
RESPONDENT.

Brief of Respondent in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 1197.

SECURITIES INVESTOR
PROTECTION CORPORATION,
PETITIONER,
v.
MASSACHUSETTS FINANCIAL SERVICES, INC.,
RESPONDENT.

Brief of Respondent in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

This brief is submitted on behalf of Respondent Massachusetts Financial Services, Inc. ("MFS") in opposition to the Petition for a Writ of Certiorari to review the judgment of the Court of Appeals for the First Circuit entered on December 1, 1976. Respondent respectfully submits that the Petition should be denied on the grounds that this case was properly decided by the Court of Appeals and does not involve an important question of federal law which should be settled by this Court.

Statutory Provisions Involved.

Section 3(a) of the Securities Investor Protection Act (SIPA)[1] provides, in pertinent part:

> (a) Creation.—There is hereby established a body corporate to be known as "Securities Investor Protection Corporation" (hereafter in this chapter referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by act of the Congress. SIPC shall—
>
> . . .
>
> (2) be a membership corporation the members of which shall be—
>
> (A) all persons registered as brokers or dealers under section 15(b) of the 1934 Act, and
>
> (B) all persons who are members of a national securities exchange,
>
> other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts . . . .

Section 2 of SIPA provides, in pertinent part:

> Except as otherwise provided in this chapter, the provisions of the Securities Exchange Act of 1934 . . . apply as if this chapter constituted an amendment to, and was included as a section of, such Act.

[1] Pub. L. No. 91-598, §3(a), 84 Stat. 1637 (1970), 15 U.S.C. §§78aaa *et seq.*

Section 3(a) of the Securities Exchange Act of 1934 ("1934 Act"),[2] 15 U.S.C. §78c(a), provides, in pertinent part:

> When used in this chapter, unless the context otherwise requires—
>
> • • •
>
> (4) The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.
>
> (5) The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.
>
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Question Presented for Review.

Section 3(a) of SIPA establishes the Securities Investor Protection Corporation ("SIPC") and provides that its members shall include all exchange members and brokers or dealers registered under the 1934 Act, except those "whose business as a broker or dealer" consists exclusively of certain enumerated lines of business, including "the distribution of shares of registered open end investment companies [mutual funds] . . . ." This case concerns the interpretation of the words "business as a broker or dealer" as used in section 3(a)(2) of SIPA and presents for review

[2] 15 U.S.C. §§78a *et seq.*

the question whether an investment adviser which registers as a broker-dealer under the 1934 Act solely for the purpose of distributing the shares of the mutual funds it advises is exempt from SIPC membership because its "business as a broker or dealer" consists exclusively of "the distribution of shares of registered open end investment companies [mutual funds] . . . ."

Statement of the Case.

The Facts

MFS is a Massachusetts corporation which from its incorporation in 1969 until 1973 was exclusively engaged in business pursuant to its registration under the Investment Advisers Act of 1940 ("Advisers Act").[3] Until 1973, MFS was organized into two divisions, the Investment Counsel Division and the Mutual Fund Division. The Investment Counsel Division provides advice to private clients whose funds and securities are held and transferred by third persons unaffiliated with MFS, and the Mutual Fund Division provides investment management services to six mutual funds. Until 1973, MFS conducted no business requiring it to register as a broker-dealer under the 1934 Act. In December, 1972, however, MFS registered under the 1934 Act as a broker-dealer exclusively for the purpose of distributing through its newly formed Sales Division the shares of mutual funds it advised. Since that time MFS has conducted no other business which would require it to register under the 1934 Act or which would result in its being a broker or dealer as those terms are defined in the 1934 Act, although it has continued to conduct its principal business as an investment adviser.

[3] 15 U.S.C. §§80b-1 *et seq.*

Reasons for Denying the Petition.

SIPC's contention that the Court of Appeals' "construction of section 3(a)(2) endangers the funding of the SIPC program and the protection of public investors, and results in uncertainty and conflict in the application of section 3(a)(2)" (Petition, p. 8) is nothing more than an exercise in hyperbole that is belied by the facts.

De Minimus Effect on SIPC

Although SIPC admits that its fund at year-end 1976 was substantial ($116.2 million), it appears to argue that the loss of assessments from MFS (a total of $5,368 in 1972 and 1973) and from two firms with which it is engaged in similar litigation (involving "more than $100,000 aggregate assessments") jeopardizes SIPC's ability to satisfy demands on its fund and to achieve its statutory minimum target of $150 million.[4] Such a proposition not only lacks credibility on its face, but is in direct contradiction to recent statements of Hugh F. Owens, Chairman of SIPC, which make clear that the number of member failures has fallen drastically over the last few years and that SIPC is less than two years away from reaching its $150 million goal, after which a new assessment rate and structure may be adopted:

> *The downward trend in member failures continued in 1976 when only four companies were placed in SIPC liquidation. That is an all-time low, off significantly from eight in 1975 and 15 in 1974. It is a far cry from the high year, 1972, when trustees were appointed for 40 members.*

[4] It is interesting to note, however, that SIPC has not stated that it considers those two cases to be indistinguishable from the case at bar (Petition, pp. 8-9).

Fewer liquidations is good news for . . . SIPC members who benefit not only from improved public confidence, but also from a reduction in SIPC's expenses.

With the declining number of new cases, the cost of SIPC's operations has gone down significantly . . . . Less money was needed to satisfy a small number of claims in new cases and most of the claims in older cases have, of course, been satisfied for some time . . . Net growth of the SIPC Fund during the year was $34 million, resulting in a Fund balance of $116 million as of December 31, 1976. This is the largest annual increase in SIPC's history and is a healthy growth indeed.

The principal source of SIPC Fund revenues is the assessments on members. *The current rate of 1/2% on gross securities business revenues is mandated by the 1970 Act and must remain in effect until the Fund reaches $150,000,000, completing the build-up phase. At that time, which we estimate will be sometime in 1978, SIPC may change the assessment rate.*

In September I named a Special Task Force to consider the future assessment rate and structure . . . .

SIPC is in good shape after six years of operations. The Fund is growing. Improved regulatory procedures have been implemented by the self-regulatory organizations and the SEC. *The number of broker-dealer failures resulting in SIPC liquidations continues to decline,* making lower operating costs possible. *In short, SIPC is meeting the purpose for which it was intended*—to give greater protection to the investing public. 6 SIPC Ann. Rep. 4-5 (1976).[5] (emphasis added)

[5] In is interesting to note that although the 1976 annual report referred to the Court of Appeals' decision in this case, it did so without discussing its alleged significance. *See* 6 Sipc Ann. Rep. 11 (1976).

In light of the above, SIPC's contention that the Court of Appeals' decision "can only draw federal exposure [funding] closer" (Petition, p. 10) is particularly disingenuous.

No Conflict Exists

SIPC's "bootstrap" argument that this Court should review the Court of Appeals' decision because of the "conflict" or "lack of uniformity" that would result from SIPC's refusal to follow the Court of Appeals' decision in other circuits is equally without substance. Obviously, in light of the absence of a conflicting decision in another circuit, the only possible "conflict" that could exist would be one of SIPC's own making, involving SIPC's contentions as a litigant, on the one hand, and the unanimous decision of the Court of Appeals on the other. Unlike a conflict between decisions of two or more Circuit Courts, a "conflict" involving nothing more than a difference of opinion between a private litigant who has had his day in court and a Court of Appeals should not be a basis for review by this Court. It is therefore respectfully submitted that this Court should await the decisions in the two similar cases pending in other circuits (Petition, p. 8) before giving further consideration to a review of the question presented here.

The Decision Will Not Result in Administrative Burdens

SIPC's statement that the Court of Appeals' decision will result in possible "administrative difficulties in the First Circuit" (Petition, p. 9) is not only based upon an argument which the Court of Appeals clearly rejected (namely that section 3(a)(2) and section 4(i)(1) are interrelated),[6] but obscures the fact that the only inquiry

[6] Even SIPC acknowledges this fact later in its Petition: "The Court of Appeals appears to have considered Section 3(a)(2) as a membership provision unrelated to its function as part of the funding mechanism of SIPA." (Petition, pp. 15-16).

which must be made in determining if a firm is exempt from SIPC membership is whether a prospective member's traditional broker-dealer activities are limited to the lines of business enumerated in section 3(a)(2).

THE DECISION WILL NOT AFFECT CUSTOMER PROTECTION.

Relying as it so often does on words like "indeterminable" and "imponderable", SIPC gives the misimpression that the Court of Appeals' decision may preclude customers of firms like MFS from receiving the protections of SIPA:

> "Just how far the rationale of the Court of Appeals will adversely affect the public is an imponderable . . . (Petition, p. 10).

That this "argument" is nothing more than a "red herring" is clear from the fact that even if MFS were a member of SIPC, it would not have customers who would be entitled to the protections of SIPA, as MFS sells only to broker-dealers and therefore does not hold cash or securities of the investing public. *See* section 5(a)(2) of SIPA and *Securities and Exchange Commission v. F.O. Baroff Co., Inc.*, 497 F.2d 280 (2d Cir. 1974).

In short, it should be clear that SIPC has failed to meet its burden of establishing that the Court of Appeals' decision involves "an important question of federal law which has not been, but should be, settled by this court . . . ." Rule 19 of the Rules of the Supreme Court of the United States.

Argument.

THIS CASE WAS PROPERLY DECIDED BY THE COURT OF APPEALS.

Enacted by Congress in 1970 in the wake of the failure or financial instability of a considerable number of

brokerage firms, SIPA established SIPC, a nonprofit membership corporation, for the principal purpose of "providing financial relief to the customers of failing broker-dealers with whom they had left cash or securities on deposit". *Securities Investor Protection Corporation v. Barbour,* 421 U.S. 412, 413 (1975). To accomplish this purpose, SIPA requires SIPC to establish a fund by imposing assessments upon its members, who, under section 3(a)(2) of SIPA, are:

> "(A) all persons registered as brokers or dealers under section 15(b) of the 1934 Act, and
>
> "(B) all persons who are members of a national securities exchange,
>
> other than persons whose *business as a broker or dealer* consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts . . . ." (emphasis added)

It is MFS' position, upheld by both the District Court and the Court of Appeals, that because the only business which it conducts pursuant to its 1934 Act broker-dealer registration, and/or which results in its being a broker or dealer within the ordinary, traditional and defined meaning of those words, is its distribution of mutual fund shares through its Sales Division, all of its business "as a broker or dealer" falls squarely within the exempting language of subparagraph (i) of section 3(a)(2) such that it is not a member of SIPC. SIPC, however, disagrees with MFS' position on the ground

that Congress did not use the words "broker or dealer" in the sense that those terms have traditionally been used in the securities laws and industry, but rather intended to give those words the novel meaning of "securities business." From this implausible premise, SIPC argues that because MFS conducts business pursuant to its Advisers Act registration in addition, although unrelated, to the "exempt" broker-dealer business for which it registered, its "business as a broker or dealer" does not exclusively consist of the enumerated lines of "exempt business". The question presented, therefore, is whether MFS is a "broker or dealer," not because of its "exempt" broker-dealer business, but because of its unrelated investment advisory business which does not require registration under the 1934 Act or make MFS a "broker" or "dealer" in the traditional, ordinary or defined sense of those words.

As the Court of Appeals stated, "[t]he words 'broker' and 'dealer' have highly technical meaning in securities law; if Congress had not intended these words to have their usual technical sense, it could very easily have found appropriate language to so indicate. *Local 1424, Int'l Ass'n of Machinists v. NLRB,* 362 U.S. 411, 417 n.7, 80 S.Ct. 822, 4 L.Ed.2d 832 (1960)". 545 F.2d 754, 756 (footnote 3). Congress' not having done so, the technical and ordinary meaning of "broker" and "dealer" should be given to those words, as Congress is presumed to have used plain language in a statute in its usual and well settled sense, especially where, as here, the statutory language is not only "clear but also . . . produces a result which is neither absurd, unreasonable nor at variance with the policy of SIPA."[7]

[7] The inclusion in section 3(a)(2) and section 4(i)(1)'s exempting language of "the business of insurance" and "the rendering of investment advisory services" was clearly a result of "legislative overkill" in response to requests from the insurance and mutual fund industries wanting to make absolutely certain that they would not be subject to SIPC membership and assessments. For example, prior to 1970 a substantial number of insurance companies began marketing variable annuities or mutual funds as broker-dealers, and registered under the 1934 Act for that purpose. *See SEC v. Variable Annuity Life Insurance Company of America,* 359 U.S. 65 (1959). Although such insurance companies would be clearly exempt from membership and assessments under the mutual fund and annuity exempting language of section 3(a)(2) and section 4(i)(1), the insurance industry sought the additional "business of insurance" exemption to make certain that someone like SIPC with a creative imagination would not argue that their non-broker-dealer business somehow made them subject to membership or assessment. The exemption for "the rendering of investment advisory services" was similarly added. Although these additions may well involve "superfluous verbiage" (Petition, p. 15), they were inserted to "prevent" SIPC from doing exactly what it is seeking to do in this case.

545 F.2d 754, 756. *See Banks v. Chicago Grain Trimmers,* 390 U.S. 459, 465 (1968); *Flora v. United States,* 357 U.S. 63, 65 (1968); *United States v. Oregon,* 366 U.S. 643, 648 (1961); *United States v. Stewart,* 311 U.S. 60, 63 (1940); and *United States v. American Trucking Ass'ns., Inc.,* 310 U.S. 534, 543 (1940).

This rule of construction applies with all the more force in this case where section 2 of SIPA provides:

> "Except as otherwise provided in this chapter, the provisions of the Securities Exchange Act of 1934 . . . apply as if this chapter constituted an amendment to, and was included as a section of, such Act."[8]

Section 3(a) of the 1934 Act, 15 U.S.C. §78c(a), provides, in pertinent part:

[8] It is interesting to note that SIPC seeks to rewrite not only section 3(a)(2), but also section 2 of SIPA: "SIPA is not an amendment to the 1934 Act . . ." (Petition, p. 14, footnote 13).

"(4) The term 'broker' means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank."

"(5) The term 'dealer' means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account either individually or in some fiduciary capacity, but not as a part of a regular business."

As it should be assumed that Congress intends the definition of a word to apply to that word wherever it is used in a statute, the above definitions of "broker" and "dealer" clearly should apply to those terms as they are used in section 3(a) of SIPA. *See*, for example, *Patagonia Corporation v. Board of Governors of the Federal Reserve System*, 517 F.2d 803, 810 (9th Cir. 1975). Moreover:

"it is well settled that, absent evidence to the contrary, words or phrases taken from prior legislation will be given the same meaning, since there is hardly a basis for assuming that the lawmakers had anything else in mind. This consideration is even more compelling where, as here, the provision containing the word in question is part of a statute that is merely a continuation of earlier legislative schemes."[9] *United Shoe Workers of America, AFL-CIO v. Bedell*, 506 F.2d 174, 183 (D.C.Cir. 1974), citing *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 116

[9] *See also* section 80b-2(3) and (7) of the Advisers Act where the terms "broker" and "dealer" are similarly defined.

(1949) and *United States v. CIO*, 335 U.S. 106, 112-113 (1948).

Thus, by using the words "broker or dealer" (which have not only well settled meanings within the securities industry, but also clearly defined meanings in related securities laws, which meanings SIPA expressly adopts, Congress could not have stated more clearly its intention to exempt from SIPC membership those persons whose business as a traditional broker or dealer consisted exclusively of one or more of the enumerated lines of "exempt business."

SIPC nonetheless attempts to escape the above logic by arguing (Petition, p. 15) that since "the critical phrase does not refer to a broker or dealer registered under the 1934 Act. . . . [c]learly, the language in question was not tied to 1934 Act registration." As is clear from SIPC's Petition, however, the language of section 3(a)(2) was not limited to *registered* broker-dealers because at the time of SIPA's enactment certain broker-dealers (exchange members) were not required to register under the 1934 Act. Thus, in order that SIPA's membership provision (including its exempting language) would apply to all technical broker-dealers, it was necessary for SIPA to include exchange members among SIPC's members:

When SIPA was enacted, exchange members could, under certain circumstances, *do business as a broker or dealer* without being registered under the 1934 Act. II L. Loss, Securities Regulation 1289 (2d. ed. 1961). (Petition, p. 15) (emphasis supplied)

Accordingly, it is clear that when Congress used the terms "broker" and "dealer" in section 3(a)(2), it intended those terms to have their traditional and ordinary

meanings applicable to both SIPC's registered and non-registered broker-dealer members.

Although SIPC also argues that the Court of Appeals' decision results in a "conflict" between SIPA's membership and assessment provisions (Petition, p. 17), the only "conflict" that in fact exists is between SIPA, as enacted by Congress, and SIPC's proposed statutory scheme, which, however logical SIPC may think it is, Congress did not enact.[10] Moreover, SIPC's argument that the membership and assessment provisions must be read together not only requires one to ignore completely the words "broker or dealer" used in the membership provision, but also would, if accepted, not result in MFS' being a member of SIPC. The assessment provision obviously has as its aim the assessment of all of a member's non-exempt securities business that is *integrally* related to its trading or dealing in securities *in its capacity as a broker or dealer*, even though the conduct of some of that business in and of itself would not be sufficient to make that person a broker or dealer. Although resort to the legislative history is unnecessary for this conclusion, it is interesting to note the following statements referred to, in part, in SIPC's Petition:

> "Regarding the inclusion in assessable gross revenues of fees for mutual-fund-related investment advice, management and account supervision, it was the SEC's view that *such revenues 'are integral parts of the broker-dealer business'* which should be assessed . . . (footnote 50) . . . 'First such activity tends to generate additional securities business, and *brokers supplying such services* are dependent upon the maintenance of investor confidence . . . Second, *commission income* is often set off against investment advisory fees which *brokerage houses charge* (NYSE Rules 440.00). This, of course, creates a direct financial connection between such services and *commission income.*' " (emphasis added)[11]

Given this purpose and the fact that MFS' exempt broker-dealer activities are unrelated to the only other activity referred to in section 4(i)(1) that it conducts, that of rendering investment advice, it is clear that MFS should not be subject to assessment by or membership in SIPC even if the assessment and membership provision of SIPA were viewed as being interrelated.

Not only the plain wording of section 3(a)(2), but also SIPA's overall statutory scheme clearly reveals Congress' intent that only traditional brokers and dealers and not investment advisers or all firms in or related to the securities industry be SIPC members and subject to assessment. For example, SIPA's liquidation procedures concern only failing broker-dealers and their customers who have entrusted cash or securities to them (*SEC v. Baroff, Inc., supra*; *SEC v. Kenneth Bove & Co., Inc.,*

[10] SIPC's reliance on *Henry C. Coppelt dba May Pac Management Co.*, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 79,814 (SEC 1974), for the proposition that "the SEC staff has construed section 3(a)(2) in the manner urged by SIPC" is a result of its misreading of that statement, as is evident from its failure to italicize the determinative language therein which supports MFS' position:

> "Similarly, your membership in SIPC is required by the Securities Investor Protection Act of 1970 which provides that SIPC's membership shall consist of all registered brokers and dealers and all members of national securities exchanges except those who deal exclusively in mutual funds, variable annuities, the business of insurance or the rendering of investment advice to investment companies or insurance company separate accounts. *If your activities as a broker* are not confined to the exceptions stated, you are required to pay the applicable SIPC assessments." Id. at 84,201-202 (emphasis added)

[11] Petition, p. 19; Senate Hearings, discussed *infra*, at 280-1.

378 F. Supp. 697 (S.D.N.Y. 1974), and section 10(b) makes it unlawful for "brokers or dealers", not all persons in the securities industry, to engage "in business as a broker or dealer" after the appointment of a trustee. It should also be noted that section 7(d) of SIPA amended §78*o* of the 1934 Act to provide for the promulgation of regulations relating solely to:

> ". . . the financial responsibility and related practices of *brokers and dealers* including, but not limited to, [regulations concerning] *the acceptance of custody and use of customers' securities, and the carrying and use of customers' deposits or credit balances.* Such rules and regulations shall require the maintenance of reserves with respect to customers' deposits or credit balances, as determined by such rules and regulations." (emphasis added)

Because MFS' broker-dealer activities are limited to its "exempt" distribution of mutual fund shares, and because MFS' investment advisory clients, who do not deposit cash or securities with MFS, are neither threatened with the risk addressed by SIPA nor able to benefit by SIPA's liquidation procedures, MFS is clearly not one of the persons Congress intended to be a member of SIPC.

That only traditional broker-dealers and not investment advisers were intended to be SIPC members is also obvious from the fact that although MFS conducted the very same "securities business" as an investment adviser prior to its broker-dealer registration that SIPC now claims makes it a broker-dealer, MFS was not required to become a member of SIPC. To argue, as SIPC does, that because MFS registered as a broker-dealer, even though that registration was solely for the purpose of conducting "exempt business," MFS is a broker-dealer for all purposes, including the rendering of investment advice totally unrelated to any of its exempt broker-dealer activities,[12] not only forces an absurd construction on section 3(a), but also elevates form over substance. This is so because investment advisers who separately incorporate their mutual fund distribution operations, as many do, are not subject to SIPC membership, while firms like MFS whose distribution operations are independently conducted through a separate, although not incorporated, division would be subject to SIPC membership. Obviously, Congress could not have intended such an absurd result. Rather, by using the words "business as a broker or dealer" in section 3(a)(2), it intended to avoid such a result.

Legislative History

Although, as the Court of Appeals properly held, resort to legislative history is unnecessary in this case,[13] a review of the legislative history reveals its clear support of MFS' position herein.[14] For example, the House Report of the Interstate and Foreign Commerce Committee No. 91-1613, 91st Cong., 2d Sess. (1970) ("House Report"), states the purpose of SIPA:

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[12] It is clear that MFS' investment advisory business does not require registration under the 1934 Act or result in its being a broker or dealer in the usual and defined sense of those words. *First Atlantic Investment Advisory Corp.*, [1973-1974 Transfer Binder] CCH Fed. Sec. L. Rep. ¶79,746 (SEC 1974).

[13] The Court of Appeals nonetheless reviewed the legislative history "with care" 545 F.2d 754, 757.

[14] SIPA evolved from three bills: H.R. 18109, 91st Cong., 2d Sess. (1970), sponsored by the securities industry's task force ("the industry's bill"); H.R. 18081, 91st Cong., 2d Sess. (1970), sponsored by the SEC ("the SEC's bill"); and H.R. 18458, 91st Cong., 2d Sess. (1970), sponsored by both the SEC and the industry.

"The primary purpose of the reported bill is to provide protection for investors if the broker-dealer with whom they are doing business encounters financial troubles." *3 U.S. Cong. & Admin. News,* 91st Cong., 2d Sess. 5255 (1970).

The House Report goes on to state:

"Membership in the corporation would consist of all brokers and dealers registered under Section 15(b) of the Securities Exchange Act of 1934 and all persons who are members of a national securities exchange, except those persons *whose business as a broker or dealer* consists exclusively of the distribution of shares of mutual funds or variable annuities, would not be included in membership." *3 U.S. Cong. & Admin. News,* 91st Cong., 2d Sess. 5258 (1970) (emphasis added)

The legislative history also reveals that the exemption in question was based upon the fact that the distribution of mutual fund shares did not involve the risk to the public that SIPA addressed. For example, in discussing the SEC's bill, which provided for SEC exempting authority,[15] then SEC Chairman Budge clearly stated that the absence of risk to the public would be *the* factor in exempting broker-dealers from SIPC's coverage:

"Mr. Budge. *I think there would be but one standard, and that would be whether or not the public was at risk. If the public were not at risk, the Commission would exempt the individual firm or class of firms.*

Mr. Focht. But I gather you are saying that that standard should not be written into the act, or should not be in the bill?

[15] H.R. 18081, 91st Cong., 2d Sess. (1970) §2.

Mr. Budge. We certainly have no difficulty with writing it in, *but it seems to me it is implicit that the Commission would not wish to keep in the insurance program firms where there was no risk to the public.*" Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109 and H.R. 18458 Before the Subcomm. On Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess., 308 (1970) ("House Hearings") (emphasis added).

Although later in the House Hearings Mr. Budge indicated there would be "no *flat* exemptions" based upon risk to the public (House Hearings at 335), it is clear from his remarks that the lack of such risk was to be the determinative factor in granting exemptions under the SEC's bill.[16] Mr. Budge's testimony during the Senate Hearings was to the same effect:

"... the Commission felt that in the first instance it should cover the entire community everyone who is in the securities business, and then under this legislation the Commission is given *broad exemptive powers which I would anticipate it would use to exempt out people who do not actually create a risk.*" (Senate Hearings at 282) (emphasis added)[17]

[16] Mr. Budge indicated during the Senate hearings, for example, that because specialists are such an "integral part of the securities business," they would not be exempted from SIPC membership even though they posed no risk to the public. Hearings on S. 2348, S. 3988, S. 3989 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 281 (1970) ("Senate Hearings").

[17] In discussing the SEC bill's exempting provision, Mr. Budge also stated:

"The intention was, I think, throughout, to include the entire family of the securities industry, and then the Commission is given *very broad powers to exempt out those where it feels there is no public exposure.*" (House Hearings at 334) (emphasis added)

Mr. DeNunzio, Chairman of the industry task force, was the chief industry spokesman with respect to the industry's bill, which also provided for SEC exempting authority. Mr. DeNunzio clearly stated the industry's intention that exemptions be based on lack of risk to the public:

> "Mr. Focht. Turning to the proposal itself, Mr. DeNunzio, I notice in the new section 13 which would be added to the 1934 Act, you provide that the Securities and Exchange Commission may grant exemptions from membership in SIPC or a comparable organization.
>
> "What type of exemptions do you contemplate?"
>
> "Mr. DeNunzio. *I think the SEC would consider making exemptions to certain broker/dealers who do not carry any customer accounts. For example, those who do essentially a cash business, and make direct mutual fund sales, distributing operations, so that they do not carry any customer accounts of any kind.*
>
> *"I would think that the SEC might consider that those kinds of broker/dealers could be exempted from SIPC.*
>
> "Mr. Focht. If I understand the section correctly, it would be the SEC's determination on that question?
>
> "Mr. DeNunzio. That's right." (House Hearings at 186) (emphasis added).[18]

[18] *See also,* "Statement of Robert L. Augenblick, President, the Investment Company Institute":

> "We also believe in the principle that the cost of the insurance should be borne by those who create the risk. For this reason, *we urge that the insurance proposal ultimately adopted should contain a statutory exemption from mandatory participation for those broker-dealers who do not hold and utilize in their own business the customers' free credit balances and customers' securities. The justification for this exemption would be that the exempted broker-dealer's business is not the type that presents the risks that the insurance proposal is designed to guard against."* (House Hearings at 308); and

"Statement of American Life Convention and Life Insurance Association of America", which prompted the variable annuity and insurance "exemptions":

> "The risks at which the bills are directed arise only in the case of those broker-dealers who hold and use customers' free credit balances and customers' securities in their own operations. There are a number of broker-dealers – including life insurance companies (or their subsidiaries) which market variable annuities and mutual funds – which do not operate in this fashion. These broker-dealers should not be required to finance a program for others – they should not be forced to pay for a program which they and their customers do not need and from which they and their customers derive no benefit." (House Hearings at 399)

In light of the above, MFS is confounded by SIPC's misstatement that under both the SEC and industry's bills "risk to the public was merely a factor in determining appropriate assessments." (Petition, p. 19). This misstatement is particularly egregious in light of statements made by SIPC's Chairman and SEC Commissioner Loomis during Congressional hearings on proposed amendments to SIPA, which make abundantly clear that the exempting language in question in this case was adopted based on the absence of risk that firms like MFS pose to the public. For example, Mr. Owens, Chairman of SIPC, stated:

> "Firms dealing exclusively in the sale of mutual funds or variable annuities are not now required to be SIPC members. Their exclusion is apparently *based,* at least in part, *on the argument* that since they are essentially sales organizations, not carrying customer accounts and generally not holding securities or funds, *they present no risk to the SIPC Fund."* Hearings on H.R. 8064 Before Subcomm. on Consumer Protection and Finance of the Comm. on Interstate and Foreign Commerce, House of Representatives, 94th Cong., 1st

Sess. (1975), p. 57 ("House Amendment Hearings") (emphasis added)

Similarly, SEC Commissioner Loomis, who had participated in the Congressional hearings on SIPA, stated:

> "The exclusion of these broker-dealers [exempted under section 3(a)] was *prompted by the idea* that, because they rarely held customers' funds or securities, *their customers did not need SIPC protection* and, therefore, they should not have to pay SIPC assessments." (House Amendment Hearings at 163). (emphasis added)

It is interesting to note that Mr. Loomis went on to point out, contrary to SIPC's contentions, that the membership provision was not meant to be a function of the assessment provision:

> "Once this was done [the exemption of distributors of mutual fund shares, etc.], it was deemed necessary to exclude revenues from the same source as a basis for SIPC assessments on broker-dealers who were members of SIPC, in order to avoid creating a competitive inequality between members and nonmembers in these fields." (House Amendment Hearings at 163).[19]

The above legislative history makes clear that although in enacting SIPA Congress did not allow for the broad ex-

[19] SIPC's almost exclusive reliance on passages from the House Report (Petition, pp. 22-23) for its contrary view is misplaced, as it is obvious that those passages were merely less carefully worded than the passage from the House Report cited *supra* at p. 18. Moreover, the Committee's apparent lack of concern *in the context of the assessment provisions* over whether or not the "exempt activities" were broker-dealer activities is not surprising, for the assessment provisions allow for assessments on certain activities which, although integrally related to a broker-dealer's business, do not involve technical broker-dealer functions. It is, however, interesting to note that in its Petition SIPC stopped immediately short of the House Report's explanation of why it was removing from the assessment provisions revenues from the distribution of mutual fund shares and variable annuities:

> ". . . your committee was of the opinion that there are found on both sides of these transactions persons in the status of investors rather than an investor and a person who is an operator within the market fraternity—that is, one who depends upon the operations of the market and benefits substantially by a healthy and viable marketplace." (House Report at 7)

emptions based upon lack of risk to the public that were contemplated by the SEC and industry's bills, it did provide for the limited exemption, applicable here, of firms like MFS based upon the fact that their traditional or technical broker-dealer activities were limited to the distribution of mutual fund shares involving no risk to the public. Accordingly, the words "business as a broker or dealer" as used in section 3(a)(2) in relation to the "mutual fund exemption" should be read so as to exclude MFS from SIPC membership. To hold otherwise would thwart Congress' intent in enacting the exemption and have the unintended effect of broadening SIPC's membership to include not only traditional broker-dealers, but also traditional investment advisors.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition should be denied and that Respondent should be awarded its costs.

Respectfully submitted,

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Supreme Court, U. S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1197

SECURITIES INVESTOR PROTECTION CORPORATION,
Petitioner,

v.

MASSACHUSETTS FINANCIAL SERVICES, INC.,
Respondent.

REPLY BRIEF

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

15925-4-77

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REPLY BRIEF

The major deficiencies in MFS' brief are (1) its understandably limited perception of the importance of the issue and (ii) its simplistic argument which suffers as much from a misconception of the issue as it does from a significant lack of responsiveness to SIPC's arguments.

IMPORTANCE OF THE QUESTION

MFS' effort to suggest banality in this case overlooks the essence of why SIPC urges that the issue is "certworthy", *i.e.*, that "The Proper Construction Of

Section 3(a)(2) Is Important To The Administration Of SIPA" (Petition at 8). That is a sufficient independent basis for review under Rule 19(1)(b). The four components of that basis discussed by SIPC have not been undermined by MFS.

Uniformity

MFS does not question the importance of a uniform national application of SIPA, or the clear prospect of the contrary so long as this Court does not decide the issue. Instead, it merely notes an absence of conflict between two or more Circuits which is not the basis for review urged by SIPC. SIPC is charged with a responsibility to administer SIPA, including its funding. *SIPC v. Barbour*, 421 U.S. 412, 416 (1975). The issue presented is of vital importance to the federal program, and MFS inappropriately dismisses SIPC as a disappointed "private litigant". (MFS Brief at 7).

Financial Impact

MFS unfairly suggests that SIPC seeks review merely because of the dollar impact of three cases on SIPC's funds, and then attempts to dilute this Court's interest because SIPC, as it were, is hale and hearty. Regarding the former, SIPC has over 5,000[1] members whose payments through a wide-ranging statutory apparatus[2] make the actual dollar impact impossible to know at this time. Regarding the latter, while the current rate of new SIPA liquidations is clearly down

[1] 6 SIPC ANN. REP. 7 (1976).

[2] Under section 9(a) collections are effected nationwide by the various self-regulatory organizations and SIPC.

from the difficult years of 1971-73, the fact is there have been more new proceedings (five) in the six-month period ending March 31, 1977 than in any like period during the two previous years.[3] In the final analysis, however, this aspect of the importance of the issue does not and cannot depend upon the current contents of SIPC's purse or surmises as to its future expenditures. It is essential to the SIPA program that it be funded by the industry as Congress intended.

Customer Protection

Rather than answer the full breadth of this point (Petition at 10) MFS merely states that it ". . . sells only to broker-dealers and therefore does not hold cash or securities of the investing public." (MFS Brief at 8). First, such broker-dealers who purchase mutual funds from MFS on behalf of their customers could be entitled to protection from SIPC's funds if MFS is a SIPC member.[4] Second, SIPC has empirically determined that mutual fund sales and distributions create a drain on SIPC's funds.[5]

[3] 6 SIPC ANN. REP. 7, 18 and 26 (1976).

[4] Sections 6(d) and 6(f)(1)(D). Mutual fund shares are securities, of course.

[5] "To date, however, cash in lieu of missing mutual fund shares has been paid to 50 claimants in 8 different SIPC liquidations for a total of $190,655.

In addition, in three of those liquidations, mutual fund shares having an aggregate value of $69,483 were distributed to 14 customer claimants." Hearings on H.R. 8064 [Securities Investor Protection Act Amendments of 1975] Before Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 1st Sess. 57-58 (1975) (statement of Mr. Owens, Chairman of SIPC).

Administrative Burdens.

This point (Petition at 9) has not been answered in a way which warrants comment.

THE MERITS

MFS's first tack is to erect a strawman by erroneously stating the issue. Contrary to MFS' statement,[6] the issue is not whether MFS is a broker or dealer because it renders investment advice to private clients. It has been stipulated that MFS is a registered broker-dealer, and that its securities business has not consisted exclusively of the exempting lines of business specified in section 3(a)(2) of SIPA.[7] The question is whether as a broker-dealer it is a SIPC member liable for assessments on its revenues which are assessable under section 4(i)(1).

MFS' discussion of the statutory language is preoccupied with the tidy but erroneous proposition that Congress used the terms broker and dealer in their technical 1934 Act sense. Thus, it evades much of SIPC's argument (Petition at 13-17), including the luminiferous reality that Congress' actual usage of the terms was clearly not technical. MFS fobs off that point in a footnote as "legislative overkill" (MFS

[6] "The question presented, therefore, is whether MFS is a 'broker or dealer,' not because of its 'exempt' broker-dealer business, but because of its unrelated investment advisory business which does not require registration under the 1934 Act or make MFS a 'broker' or 'dealer' in the traditional, ordinary or defined sense of those words." (MFS Brief at 10).

[7] "9. On December 24, 1972 and at all subsequent times relevant to the issues herein MFS has not been engaged exclusively in the lines of business specified in subparts (i) through (iv) of section 78ccc(a)(2) of the 1970 Act." Stipulation of Facts at 4.

Brief at n.7, pp. 10-11). That explanation clearly does not suffice. The quandary to which MFS' argument inevitably leads is exemplified by its statement that "Congress could not have stated more clearly its intention to exempt from SIPC membership those persons whose business as a traditional broker or dealer consisted of one or more of the enumerated lines of exempt business." (MFS Brief at 13).[8] As SIPC has observed (Petition at 14-15), neither insurance nor investment advice are technically the business of a broker or dealer, although both are specified in section 3(a)(2).

Perhaps the most unsupportable proposition to which MFS' sterile rationale leads is its contention that SIPA's membership [section 3(a)(2)] and assessment [section 4(i)(1)] provisions are not interrelated (MFS Brief at 14-15). SIPC's petition sufficiently establishes the contrary both as a matter of statutory language and legislative history (Petition at 15-26, especially 22-25). The most probative aspects of the legislative history, especially when read in light of the prior bills and testimony, are set forth at pages 20-25 of SIPC's Petition.

MFS' brief offers no effective response to SIPC's discussion of the relevant legislative history. Instead, it seeks to divert attention from the critical portions of that history by engaging in a protracted discussion of the relationship of risk to the SEC's exempting

[8] Similarly, in attempting to refute SIPC's description of the administrative problems generated by the decision below, MFS states that such decision requires only one inquiry, *i.e.*, ". . . whether a prospective member's traditional broker-dealer activities are limited to the lines of business enumerated in section 3(a)(2)." (MFS Brief at 8.)

powers which are not included in SIPA as enacted (MFS Brief at 17-23).

CONCLUSION

For reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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